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No. 07-395
(Application No. 07A252)

FILED
SEP 26 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

THOMAS D. ARTHUR,

Petitioner,

—*v.*—

RICHARD F. ALLEN,
Commissioner, Alabama Department of Corrections, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONER'S SECOND SUPPLEMENTAL BRIEF IN FURTHER SUPPORT OF HIS PETITION FOR A WRIT OF CERTIORARI AND MOTION FOR A STAY

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September 26, 2007

The State of Alabama has now decided to change its lethal injection protocol in an attempt to comply with the minimum standards set forth in the Eighth Amendment to the United States Constitution. The State, however, still plans to execute Thomas Douglas Arthur on September 27, 2007 before any of these changes have been implemented. In light of these new facts, Mr. Arthur files this Second Supplemental Brief in Further Support of his Petition for a Writ of Certiorari and Motion for a Stay of Execution.

FACTUAL BACKGROUND

This morning, Mr. Arthur's counsel received a telephone call from Scott Rouse, deputy legal advisor to the Governor of Alabama, Bob Riley. Mr. Rouse informed counsel that in connection with *McNair* v. *Allen*, 06-cv-00695, a lethal injection litigation currently pending in the United States District Court for the Middle District of Alabama, the State of Alabama has decided to make changes to its lethal injection protocol. According to Mr. Rouse, the State of Alabama plans to conduct "an assessment of consciousness" after administration of the first drug of a three-drug cocktail but has not yet decided who will conduct the "assessment of consciousness"—Department of Correction officers, the Warden or emergency medical technicians. According to Mr. Rouse, the State of Alabama is also considering other changes to its protocol. Nevertheless, the State of Alabama intends to execute Mr. Arthur on September 27 pursuant to its current lethal injection protocol, and Governor Riley has refused to stay the execution pending implementation of the changes to

such protocol. Mr. Arthur's counsel also spoke with Anne Adams today, counsel for the Alabama Department of Corrections, who confirmed the information provided by Mr. Rouse this morning. Mr. Arthur's counsel understands that the State of Alabama has been considering these changes for the past few days, during which attorneys from the Attorney General's Office have continued to argue that Mr. Arthur cannot succeed on the merits in his own challenge to Alabama's lethal injection protocol.

ARGUMENT

Yesterday, the Supreme Court granted a writ of certiorari to the Kentucky Supreme Court in *Baze* v. *Rees*, 07-5439, to address the important constitutional questions raised in the petition for a writ, including, among others, the proper standard for determining whether a method of execution violates the Eighth Amendment to the United States Constitution.

Today, Mr. Arthur's counsel learned that the State of Alabama will join the long list of states that are making changes to their lethal injection protocols. (*See* Mr. Arthur's Petition for Writ of Certiorari at 24-27.) Although the State of Alabama insists that Mr. Arthur has failed to demonstrate a likelihood of success on the merits of his challenge to the State's lethal injection protocol, the State's decision to change its protocol is an implicit concession that such protocol violates the United States Constitution. Without a stay, Mr. Arthur runs the grave risk of being subjected to cruel and unusual punishment. The State of Alabama has no basis to argue that it will be prejudiced by staying

Mr. Arthur's execution until its new protocol can be applied.

CONCLUSION

Based on Alabama's expressed intent to change its lethal injection protocol, along with the reasons expressed in Mr. Arthur's Petition for a Writ of Certiorari, Mr. Arthur respectfully urges this Court to grant his Petition and his Motion for Stay of Execution.

Respectfully submitted,

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